# Chapter I Introduction

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## I. BACKGROUND

Legal reform or "*Reformasi Hukum*" in Indonesia in the post-1998 period can be characterized as the largest legal reform undertaking in the history of Indonesia including the pre-independence Dutch colonial period up to 1945. The areas in which legal reform were undertaken included almost all areas of Indonesian law. One of the largest changes and impacts of legal reform was the series of four amendments to the 1945 Constitution between 1999 and 2002. There have been a tremendous number of laws and regulations either enacted or repealed during the reform period. Despite these changes, there is still considerable discussion that the reforms remain unfinished, particularly with respect to constitutional amendments. According to the National Medium Term Development Plan (PJM) 2004-2009, the considerable delay of enacting implementing laws is criticized and noted as one of the most serious problems facing legal reform in Indonesia.

Constitutional changes have brought about dynamic changes to the core of the Indonesian legal system. The biggest of these impacts is the introduction of the Separation of Powers Principle. Under this principle, exclusively enlarged executive powers were dissolved, which served to accelerate the creation of a checks and balances system in balancing the powers among governmental organs, especially, parliament and the judiciary. What is most striking in terms of Constitutional reform is the introduction of regional autonomy and the very large changes in the relationships between the Central Government and Regional Governments. Human rights has also become a focus area for greater legal reform.

Before this reform was undertaken, the general situation within the legal system of Indonesia was that it was neither integrated nor systematized.

The situation before the reform was almost like a mixture of laws of feudalistic colonial days, political laws that contributed to consolidate authoritarian rule, and some development oriented economic laws. There are several reasons why a situation like this has been created. First is historical and is based on the legal system inherited from the Netherland Indies and Japan. They could not unify the legal system throughout the land. Second is the diversity in Indonesian cultures, religions, and races, which is often symbolized by a Sanskrit word "Bhinneka Tunggal Ika" or Unity in Diversity and also by the Indonesian national symbol. The 1945 Constitution provides a mandate for Indonesia's political leaders to unify the country into a unitary state. Third is the lack of political will to integrate the country through establishing an integrated legal system.[1] The lack of political will to integrate Indonesian laws can clearly be seen in the Five Year National Development Plan (REPELITA) which started in 1969. The aspirations and expectations of the Indonesian people for legal reform are understandable in a context such as this.

## II. PURPOSE of the STUDY

The major purpose of the study under the theme is to study and assess legal reform implemented in the period from 1998 through to 2004[2] in Indonesia and to make clear the fundamental issues confronting each of the areas of law. For this purpose, we have taken up seven themes important in this book. Four areas of law mainly relate to the Constitutional changes; Independence of Judiciary, Constitutional Court, Administrative Court, and Human Rights Protection. From the institutional aspects, the weakest among the three braches is the independence of the Judiciary. The Judiciary in Indonesia used to be within the Executive. The Constitutional Court and the Administrative Court are advanced institutional areas to supervise and provide a system of checks and balances among political powers. These themes can well reflect the direct changes and developments of laws in Indonesia. The other three areas are related to economic and social development, which are becoming more and more important. These include intellectual property, labor law, and environmental law, all of which are legal areas subject to continual discussion. The intention of taking on these particular areas was to study legal changes and the impacts of legal reform in

socio-economic areas as well as the changes to the role of law in these areas. These socio-economic areas of law will become more and more important in the transitional process to a civil society.

In order to examine these subjects, a study team was established with the kind support of the Faculty of Law at the University of Indonesia. In June 2006, we had the first meeting to discuss the research framework and objectives of the research to be undertaken. It was one of the editors' ideas to assess the legal reform in specific areas of law especially from the point of view of whether democratization has been achieved. This is because the establishment of democracy has been the most popular key word in the democratization movement. However, in the legal reform related official documents, the word of democratization is seldom found. Political democratization is taken up in the Five-year National Development Plan (PROPENAS 2000-2004) but it is not discussed together with legal reform. Rather, it could be assumed that realization of democratization through the establishment of democratized legal system has not been considered as a primary goal. Each of the respective researchers would undoubtedly have different ideas and perceptions regarding whether legal reform has been consistently and successfully carried out, is unfinished, or has failed. Discussions and assessments of each article will be explained later.

In a context such as that noted above, the purposes of this book are directed to the following.

(1) To study the changes and development of law in the legal reform process from 1998 to 2004 in Indonesia, by taking up individual areas of law,

(2) To analyze the changes in the respective areas of law brought by legal reform and with a theoretical analysis,

(3) To assess the changes of each area of law, taking into consideration the future tasks left with the perspectives drawn from the study.

## III. OVERVIEW of INDONESIAN LEGAL REFORM 1998-2004

The legal reform process started under the former President Habibie who succeeded to the office of the President after former President Soeharto

resigned. The Broad National Policy Guidelines (GBHN) 1999-2004 explains the general legal conditions of Indonesia in Chapter 2 in three points; lack of supremacy of law, lack of enforcement of law, and the need to protect Human rights. This is further elaborated as ten policy directions in Chapter 4 as follows:

i) To develop legal culture in all areas to establish supremacy of law and a law state (*Negara hukum*),
ii) To renew all the laws inherited from colonial days and discriminative national laws, while respecting religious laws and customary laws,
iii) To establish a consistent legal system to ensure legal certainty, justice and truth, supremacy of law, and human rights protection.
iv) To promote ratification of international conventions on human rights,
v) To develop moral integrity and professionalism among law enforcers such as the police,
vi) To establish an independent judiciary that is free from the influences of political authorities,
vii) To develop laws and regulations that will support economic activities in a liberalized business era without hurting national interests,
viii) To develop cheap, speedy, and open court procedures that are free from KKN (corruption, collusion, and nepotism),
ix) To encourage understanding and awareness toward human rights while protecting, respecting and establishing human rights in all aspects of life, and
x) To stop court procedures against cases on human rights infringement and undecided human rights.

PROPENAS 2000-2004 was formulated to realize the national policy. In the past legal reform had been less of a priority in national policies and plans (GBHN and REPELITA) however this changes as it was listed as the second most important priority after the "development of democratic political system" in the PROPENAS. Chapter 3 of the PROPENAS is titled "Development of Law" and consists of 3 sections; General, Policy Directions, and Development Programs. The Content of the "Policy Directions" section is

mere repetition of the content already stated in the GBHN.

The "Development Programs" are consolidated into four programs.[3] The first program of PROPENAS concentrates on the basic activities of enacting laws and regulations as in the following;

i) To compile laws that will make it possible to accommodate aspirations of society, considering and evaluating religious laws and adat laws of the society,

ii) To establish mechanisms between the Government and the DPR (House of People's Representatives) through enacting laws based on the amended Constitutional Articles 5(1) and 20,

iii) To improve the role of the PROLEGNAS (National Legislation Program),

iv) To develop laws that will support decentralization and enable people's access to information,

v) To revise or make economic laws to support economic activities in a liberalized economy, and develop laws that will protect the ecosystem, function of the environment, and the life of local people,

vi) To ratify international conventions including those related to human rights,

vii) To improve coordination and cooperation on legal research between central and regional institutions,

viii) To develop laws regarding legal services, and

xi) To improve the quality and quantity of the legal drafters in the respective Governmental institutions and organizations.

In the attached Table D "Matrix of Legal Development Policy" contained in the PROPENAS 2000-2004, 120 laws are scheduled for amendment or repeal. The number of laws included in the list are classified by area; legal affairs 32, economy 27, politics 23, religion 4, education 1, socio-cultural 14, regional development 5, environment 10, and defense and public order 4.[4]

As for the result, according to the Medium Term National Development Plan 2004-2009, BAPPENAS states[5] that a total of 383 Government Regulations that had been mandated by 211 Acts were enacted during the legal reform period of 2004-2009, however, this is only 15% of all

the proposed Government Regulations that are to be enacted.[6] Several other problems that are pointed out in this section are: overriding and inconsistencies of laws, delay of enacting implementing laws, and the lack of judicial cooperation.

Further according to the BPHN (National Development Law Center), PROLEGNAS plans to enact 140 laws during the period 2006-2009 based on the inventory survey and analysis based on the above Medium Term National Development Plan. Furthermore, in 2006 an additional 83 drafts will be proposed for enactment during the PROLEGNAS period. Among them are: 25 on political affairs, legal & public order; 35 on the economy; and 23 on social welfare.

However, on the contrary to public expectation, abrupt improvements in the legal field—dubbed as Law Reform—will not occur just because legislation is amended and introduced. Unfortunately, creating laws that work in a country undergoing transition cannot be accomplished by casting a magic spell. It is true that new pieces of legislation have been passed and amended since Indonesia entered a period now popularly referred to as the *Era Reformasi*.

However, those who expect that amendments and legislation will make Indonesia's legal environment better will be sorely disappointed. Those who assume that by merely fixing regulations is the answer for the multi-dimensional problems faced by Indonesia are dead-wrong. Unfortunately, political leaders and policy makers are still clinging in vain to this wrong assumption.

In actual fact, amended and newly introduced legislation, even introducing new legal institutions, have created fresh problems rather than acting as a panacea for positive change. The challenges facing the nation in regards to improving its legal system are multi-faceted. First, lawmakers and drafters have not paid sufficient attention to ensuring that the laws they create can be implemented effectively. At the national level, for example, laws are passed without taking into account the implementation gap in different regions. Laws are often written with enforcement conditions in Jakarta in mind but they tend to disregard existing legal infrastructure in various regions in Indonesia.

Unfortunately, legislators will continue to pass unrealistic legislation in the years to come. In addition, requested legislation by the political elite,

foreign countries or international financial institutions will also continue. Fixing weak law enforcement will be the key factor to improving the country's legal system. Corruption and bribery have weakened law enforcement. In every line of law enforcement, the legal apparatus is prone to corruption or bribery.

Furthermore, the general public's trust in law enforcement is also being eroded by the fact that it is often used as a political commodity and over the longer term this trend will grow to become a major source of distrust. Selective law enforcement by the authorities and ongoing disputes between legal institutions such as the Supreme Court and the Judicial Commission are not helping to resolve the uncertain legal climate.

Another factor causing weakness in law enforcement is the government's limited budget to tackle the problem. Budgetary funds allocated by the government for human resources and legal infrastructure are grossly inadequate. Of course various efforts to improve law by the government will be continued. However, many in society will view them as not being enough - not enough in terms of public expectation by a democratically elected government; not enough by foreign investors; and not enough for the economy to take off.

There are several reasons why this will happen. First of all, fixing legal problems is not an easy task and will require time and energy. Today's effort may only see results in 10 years or perhaps not even until the next generation. As such efforts to fix the legal system must be considered as an investment for the future. Secondly, the public wants to see quick results although there is no quick fix. In addition, there is a huge gap between expectation and reality and this gap will result in dissatisfaction. There is a long way to go in attaining a workable legal system in Indonesia.

## IV. SUMMARIZED DISCUSSIONS and ASSESMENTS

Following are the summarized discussions and short assessments of each areas of law after the reform.

*Dr. Rifqi Assegaf (Chapter II) who* assesses the court reform process in Indonesia from 1998 to 2006. There are three angles which are used for discussion: changes that have taken place at the constitutional and legislation level; changes at the institutional level; and changes in the relationship

between the courts and other institutions. The author argues that despite some interesting changes, court reforms have been slow in coming and have fallen short of addressing the key issues affecting the court. The author identifies two key weaknesses that need to be improved to ensure the future success of court reform, which are the court's ability to manage change and external support as well as pressure, especially from the Parliament and the Government.

*Professor Benny K. Harman* (Chapter III) explains that the introduction of the Constitutional Court in Indonesia has brought about an expectation to be able to develop democratization through legal process. Under this system, all the State's actions can be reviewed whether they are Constitutional or not. It can work as a supporting system to check and balance the State's administration and to fill out the perception gaps toward the lack of justice among people in communities. Judicial review is based on the theoretical concept of Constitutionalism. However, this system in Indonesia cannot be said to be perfect, at least not yet, it has some principal problems. One of which is the Constitutional provisions related to the Constitutional Court, which affects the position, authority, and recruitment of judges to the Constitutional Court.

*Dr. Anna Erlyana* (Chapter IV) discusses the enactment of Law No. 5 of 1986 on the Administrative Court which the author asserts proves that Indonesia is a country with modern legal system. However, there were a few weaknesses in this Law. During the period from 1987 to 1988, different perceptions existed toward Presidential Decrees as an object of claim or whether the Office of the President had requisite legal standing in Administrative Court proceedings. After years of public discourse on the relationship between the Government and people, it was realized that Law No 5 of 1986 was no longer suitable as a fundamental basis for administrative law disputes. Furthermore, the people's awareness of the justice delivery system has become increasingly significant. In 2004, Law No. 5 of 1986 was replaced by Law No. 9 of 2004.

*Professor Hikmahanto Juwana* (Chapter V) assesses human rights practices in Indonesia in the post-Soeharto period from 1998 to 2006. The article focuses closely on five issues. First is the commitment of the four Presidents towards human rights. Second is an assessment of the regulatory framework. Third is an assessment of domestic trials for international crimes.

Fourth is an assessment of the war on terror and the promotion of human rights. Fifth is an assessment on the work of human rights institutions. The article argues that structural and legal reform in a developing country does not necessarily have an instant effect in the improvement of human rights practices at the community level. The article concludes that structural legal change has not contributed much to the improvement of human rights conditions in Indonesia.

*Professor Agus Sardjono* (Chapter VI) discusses that globalization has brought Indonesia to the crossroads between need and reality and that Indonesia must adjust its national laws to international conventions in order to be accepted as a member of the international community, particularly as these issues relate to Intellectual Property Rights. Consequently, the development of Indonesian Intellectual Property Laws has been completely the result of top-down policy. IP laws have not been formulated based on the needs of the Indonesian people in general, but in response to the need for adjusting to global trade trends. This is the reality of Indonesia's contemporary legal politics.

*Professor Uwiyono* (Chapter VII) discusses the development of Indonesian Labor Law after 1997. Since 2000 the trade union system has changed from a single union system to a multi-union system. Unfortunately, the changing union system was not followed by any changing of the government's role in labor-management relations such as in enacting regulations regarding employment terms and labor conditions. Consequently, the development of Indonesian Labor Law can be said to be stationary at the cross roads of whether it is to become Public Law or Private Law. The unions and any other relevant parties only have authority to enact employment terms and labor conditions permitted under the provisions of the Labor Laws and regulations as they are enacted by the Government.

*Mr. Naoyuki Sakumoto* (Chapter VIII) discusses the development of environmental law in Indonesia based on the Environmental Management Act of 1982 and the amended Act of 1997. The author poses a question why under the almost totally revised Constitution of 1945, the Basic Act was left unamended for more than a decade. Contradictions such as the national decentralization policy are explicitly seen between the Act and the amended Constitutional provisions. Numerous implementing laws have been enacted under the Basic Act of "*orde baru*." The author tries to study this antagonistic

legal situation with the latest discussions on the need to amend the Act and also from the characteristics of environmental law mandated as social development law and administrative law at the developing stage.

## *NOTES*

[1] For example, among the Engelbrecht Law Statutes volumes on Indonesia, which is one of the most comprehensive and reliable compilation of laws and statutes of Indonesia in three volumes published in 1989, one volume is occupied with laws and statutes in only the Dutch language and major codes like the Civil Code and Criminal Code were the translated versions from the Dutch colonial period. ("*Himpunan Peraturan Perundang-undangan Republik Indonesia*" Engerbrecht, Ichtiar Baru-van Hoeve, Jakarta, 1989).

[2] The coverage of legal reform period may change depending on the area of law concerned. However, the most vital period of reform is agreed on among the writers as this period.

[3] The four programs are: enacting laws and regulations, empowerment of courts and legal enforcement institutions, providing of guidance on KKN problems and infringement of human rights, and raising legal awareness and development of legal culture. It seems that the PROPENAS understands legal reform in a rather broad way. However, this book focuses on the development of specific areas of laws.

[4] Rencana Pembangunan Jangka Waktu Menengah (PJM) Tahun 2004-2009 (PP No. 7, 2005).

[5] Ibid. Section III.9, p. 2.

[6] Ibid.